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No. 75-180

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERSTATE 95 COMMITTEE, PETITIONER

v.

WILLIAM T. COLEMAN, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The September 17, 1971, opinion of the district court is not reported. The opinion of the court of appeals affirming in part and remanding in part is reported at 463 F.2d 402. The opinion of the district court on remand (Pet. App. C, 14a-22a) is reported at 386 F.Supp. 572. The opinion of the

court of appeals following remand (Pet. App. A, 1a-12a) is reported at 515 F.2d 1021.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 13a) was entered on May 5, 1975. The petition for a writ of certiorari was filed on August 1, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the preparation of an environmental impact statement by state officials in regard to a federally-funded highway project violates Section 102 (2)(C) of the National Environmental Policy Act of 1969, when the responsible federal official supervised the preparation of the statement and adopted it as his own.

2. Whether the State Highway Administration's failure to advise the Secretary of Transportation of its consideration and rejection of an alternative route, suggested to the state officials after public hearings had ended and after they had completed preparation of an environmental impactment statement, rendered the Secretary's approval of the final environmental impact statement invalid.

STATUTES INVOLVED

The relevant portions of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C.

4321, *et seq.*, and of 23 U.S.C. 101, *et seq.*, are set forth at Pet. App. D, 23a-24a. The Act of August 9, 1975, Pub. L. 94-83, 89 Stat. 424, amending Section 102(2) of the National Environmental Policy Act, is reproduced as an appendix to this brief.

STATEMENT

This case concerns the location of Interstate Highway 95 ("I-95") at the city of Fayetteville, North Carolina. In March 1968, the Secretary of Transportation approved a by-pass location for the Fayetteville segment of I-95, approximately five miles east of the city, rather than improving U.S. Highway 301, which goes through the city. Petitioner, an association of businessmen with establishments on U.S. Highway 301 (Pet. 4), and the Fayetteville Area Chamber of Commerce[1] sought to have the Secretary's approval set aside as being contrary to the intent of 23 U.S.C. 101(b), as amended, to utilize existing highways where feasible in order that local needs may be given equal consideration with the needs of interstate commerce.[2] Upon a review of the adminis-

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[1] The Chamber of Commerce, originally a co-plaintiff in this action, did not join in petitioner's appeal from the district court's decision on remand and is not a petitioner before this Court.

[2] The action was originally filed in the United States District Court for the District of Columbia and was later transferred to the Eastern District of North Carolina, in order that the State of North Carolina could be joined as a defendant.

trative record, the district court concluded that the respondents had fully complied with 23 U.S.C. 101(b) and granted respondents' motion for summary judgment.

Petitioner and the Chamber of Commerce appealed the decision and, in addition to alleging noncompliance with 23 U.S.C. 101(b), argued for the first time that the respondents were required to comply with the then recently-enacted provisions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321, *et seq.*, and the 1968 amendments to 23 U.S.C. 128(a).[3]

The court of appeals (463 F. 2d 402) affirmed the district court's dismissal of petitioner's original claims under 23 U.S.C. 101(b) and remanded the case for consideration by the district court of petitioner's newly-raised claims in light of the decision of the court of appeals in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323 (C.A. 4). In *Arlington Coalition*, the court held that NEPA

[3] Prior to its amendment in 1968, Section 128(a) required the state highway officials to hold a public hearing at which the focus of concern was the *economic* effect of the proposed location. The 1968 amendment requires consideration of the social and environmental effects as well. 82 Stat. 828. In 1970, Section 128(a) was amended again to require that any state certifying that it has held the required hearings must submit with its certification "a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered." 84 Stat. 1734.

and the amended provisions of Section 128(a) might apply to an ongoing highway project, even though the project was begun before the effective date of these statutes.

In the meantime, the state officials with the cooperation and participation of the Federal Highway Administration, began preparation of an environmental impact statement (EIS), as required by Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C); see Pet. App. D, 23a-24a). After several draft impact statements were circulated for comment, and after review and approval by the Department of Transportation, the Secretary released the final environmental impact statement for the Fayetteville segment of I-95 on September 17, 1973. As possible alternatives to the proposed by-pass location, the EIS considered the location favored by petitioner along Highway 301 and the alternative of doing nothing. The final EIS also incorporated the testimony and submissions from a combined design and location hearing that had been held on July 16, 1973, pursuant to the remand order of the court of appeals (Pet. App. A, 3a-4a).

On October 20, 1973, the Secretary again approved the by-pass location for the Fayetteville segment of I-95 (Pet. App. A, 4a). The respondents then moved for summary judgment in the district court. The court, after holding two hearings and reviewing the entire administrative record, rejected petitioner's challenges to the Secretary's action, finding (1) that the

EIS was properly prepared by the North Carolina Department of Highways under the supervision and guidance of the Federal Highway Administration, (2) that alternatives to the proposed action were adequately considered, and (3) that the July 16, 1973, public hearing fully complied with the requirements of 23 U.S.C. 128(a), as amended (Pet. App. C, 14a-22a).

Upon petitioner's appeal, the court of appeals affirmed the district court in all respects (Pet. App. A, 1a-12a). Finding ample participation by the federal officials in the preparation of the draft and final impact statements, the court upheld the joint state-federal effort (Pet. App. A, 3a-8a). Regarding the duty to consider alternatives, the court held that the federal officials' obligation is subject to a construction of reasonableness and found that all reasonable alternatives had in fact been considered (*id.*, at 9a-12a).

ARGUMENT

1. The first question presented by petitioner (Pet. 2-3) has been rendered moot by the enactment on August 9, 1975, of Pub. L. 94-83, 89 Stat. 424.[4] Petitioner sought to challenge the Federal Highway Administration's practice of allowing state highway departments, with federal guidance and participation, to prepare the environmental impact statements required by Section 102(2)(C) of NEPA. However, Pub. L. 94-83 amends Section 102(2) to allow

[4] The statute is reproduced as an appendix to this brief.

such state participation under the circumstances of this case and renders moot any division in the circuits that may have previously existed on this point.[5] The amendment is retroactive to January 1, 1970, the effective date of NEPA. The Fourth Circuit's decision is in harmony with the amendment[6] and leaves nothing for this Court to review on this issue.

2. Petitioner contends (Pet. 12-15) that the State Highway Department's failure to advise the federal officials that an alternative location, midway between the by-pass location and Highway 301, had been considered and rejected, rendered the Secretary's decision defective. However, as both the district court and the court of appeals recognized, the federal officials' obligation to consider alternatives, both under

[5] The amendment requires federal guidance, participation and independent evaluation of state-prepared impact statements. A review of the Fourth Circuit's decision demonstrates that it applied essentially the same criteria before approving the delegation in this case. See Pet. App. A, 5a-9a.

[6] The amendment was passed partially in response to the Second Circuit's decision in *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F. 2d 927, in which that court held participation in the preparation of an impact statement by state officials impermissible (H.R. Conf. Rep. No. 94-388, 94th Cong., 1st Sess (1975); 121 Cong. Rec. H7739-H7750 (daily ed., July 29, 1975). The federal defendants in that case filed a petition for a writ of certiorari on May 9, 1975 (*Coleman* v. *Conservation Society of Southern Vermont, Inc.*, No. 74-1413). In view of the recent amendment, the government has requested this Court to reverse the Second Circuit's decision or, alternatively, to remand the case for reconsideration in light of Pub. L. 94-83 (and, on another point, this Court's intervening decision in *Aberdeen and Rockfish R.R.* v. *SCRAP*, No. 73-1966, decided June 24, 1974).

NEPA and the Federal-Aid Highway Act, is subject to a construction of reasonableness. See, *e.g.*, *Life of the Land* v. *Brinegar*, 485 F.2d 460, 472 (C.A. 9); *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (C.A. D.C.). Thus, while an infinite number of alternatives are possible for virtually every major federal action, only "reasonable" alternatives need be considered.

The facts surrounding the state officials' discovery of the third alternative are thus important. As the court of appeals stated (Pet. App. A, 9a), some time after the July 16, 1973, public hearing, a "respected, technically qualified, and long-time resident of Fayetteville" submitted this alternative to the State Highway Department. While the exact date of the submission does not appear in the record, it is certain that the suggestion was not raised at the July 16, 1973, public hearing and it appears likely that the suggestion was not proffered until early September 1973 (see Pet. App. E, 25a). Despite the lateness of the suggestion,[7] the State Highway Department did consider this alternative and concluded that it compared unfavorably with the recommended by-pass location (Pet. App. E, 25a-29a). Moreover, the state officials concluded that adoption of this alternative would add another four years of delay to a project that had been planned since 1961 and had already

[7] The State Highway Department had submitted the environmental impact statement to the Federal Highway Administration for federal review and approval on August 24, 1973 (Pet. App. A, 4a).

been subjected to considerable delay. Accordingly, the state officials determined that it was unnecessary to supplement the final EIS or their submission to the federal officials in order to include a formal discussion of the late-presented alternative (*ibid.*).

In approving the environmental impact statement, the courts below properly applied the "rule of reason" in light of these facts. As the court of appeals recognized (Pet. App. A, 11a), "there must be an end to the process somewhere or no federal-aid highway would ever be built. So long as there are unexplored and undiscussed alternatives that inventive minds can suggest, without a rule of reason, it will be technically impossible to prepare a literally correct environmental impact statement and literally impossible for a state highway department to report, in compliance with § 128(a), the final decision on the route of a federal highway to the federal authorities." [8]

[8] Petitioner suggests (Pet. 12-15) that the court's application of the standard of reasonableness is not in accord with its application in some other circuits, but the application of such a standard must necessarily vary with the factual setting. Petitioner does not point to any decision, and we know of none, that would support the proposition that there is a conflict among the circuits on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX

Public Law 94-83
94th Congress, H.R. 3130
August 9, 1975
89 Stat. 424

AN ACT

To amend the National Environmental Policy Act of 1969 in order to clarify the procedures therein with respect to the preparation of environmental impact statements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 102(2) of the National Environmental Policy Act of 1969 (83 Stat. 852) is amended by redesignating subparagraphs (D), (E), (F), (G), and (H) as subparagraphs (E), (F), (G), (H), and (I), respectively; and by adding immediately after subparagraph (C) the following new subparagraph:

> "(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
>
> "(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
>
> "(ii) the responsible Federal official furnishes guidance and participates in such preparation,

"(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

"(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."

Approved August 9, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No 94-144 (Comm. on Merchant Marine and Fisheries) and No. 94-388 (Comm. of Conference).
SENATE REPORTS: No. 94-152 (Comm. on Interior and Insular Affairs) and 94-331 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 121 (1975):

April 21, considered and passed House.
May 22, considered and passed Senate, amended.
July 25, Senate agreed to conference report.
July 29, House agreed to conference report.

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